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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 92M-989  
30024

In the Matter of ) MM DOCKET NO. 92-201 ✓  
Order to Show Cause Directed Against )  
MARIO J. GABELLI )  
and )  
GABELLI FUNDS, INC. )

MEMORANDUM OPINION AND ORDER

Issued: October 5, 1992 ; Released: October 7, 1992

1. Under consideration are a "Petition for Leave to Intervene" filed by Garden State Broadcasting Limited Partnership (Garden State) on September 1, 1992; a "Mass Media Bureau's Opposition to Petition for Leave to Intervene" filed by the Bureau on September 15, 1992; and an "Opposition to Petition for Leave to Intervene" filed by Mario J. Gabelli and Gabelli Funds, Inc. (Gabelli) on September 15, 1992.

Background

2. In 1987, Garden State filed an application for a new commercial television station which was mutually exclusive with the application for renewal of license filed by WWOR-TV, Secaucus, New Jersey. Garden State's application was denied because it was determined that its application had been filed for the improper purpose of reaching a settlement with the renewal applicant. Thus, Garden State was found unqualified to be a Commission licensee, and it has appealed the denial of its application to the United States Court of Appeals for the District of Columbia Circuit. The appeal is now pending. (See, Commission's Memorandum Opinion and Order on the Pinelands, Inc. transfer application (FCC 92-376), released August 21, 1992.)

3. Claiming to be preserving its hearing rights in the Secaucus comparative renewal proceeding, Garden State petitioned to deny an application for Commission consent to the transfer of control of the licensee of WWOR-TV from Pinelands, Inc. to BHC Communications, Inc. Garden State attempted to support its petition by arguing that its hearing rights in any remanded renewal proceeding with respect to the comparative qualifications of the WWOR-TV licensee might be jeopardized by grant of the transfer application.

The Commission dismissed Garden State's petition for lack of standing, finding that the injury claimed involved a different proceeding and was merely contingent and speculative (FCC 92-376, para. 18). Garden State's appeal of that dismissal is also pending (Case No. 92-1388).

#### Garden State's Present Request

4. Garden State now requests to intervene in the instant proceeding which is a show cause proceeding directing Mario J. Gabelli and Gabelli Funds, Inc. (hereafter Gabelli) to show cause why they should not be ordered to cease and desist from violating Sections 73.3555 and 76.501(a) of the Commission's Rules, and Section 613 of the Communications Act. The Order to Show Cause (FCC 92-377) recites that the media interests of Gabelli reported by Pinelands and BHC in their applications and amendments placed Gabelli's attributable media interests in conflict with the above cited rules and statute. Because Garden State was an applicant for the WWOR-TV facilities, and because it previously sought to deny the transfer from Pinelands, Inc. to BHC Communications, Inc. it believes it is entitled to intervene in this show cause proceeding.

5. In support of its request to intervene, Garden State argues that it should be permitted to intervene pursuant to Section 1.223 of the Commission's Rules; that in view of the background recited above, it has substantial interest in this proceeding; that it wants to use this proceeding to gather evidence to use in its appeals; that Garden State's participation will assist the Commission; that it intends to conduct a "focused inquiry into Gabelli's media interests and the circumstances surrounding the prior failures to report those interests"; and that it has more of an incentive to develop a full record than does the Mass Media Bureau. The Petition to Intervene is supported by a "Declaration" from counsel for Garden State.

6. Garden State's "Petition for Leave to Intervene" will be denied. First, Section 1.223 of the Commission's Rules relied on by Garden State mentions only hearings involving applications and is not applicable to this show cause proceeding. Moreover, it would appear that the same stringent intervention requirements applicable to revocation proceedings are equally applicable to show cause cease and desist proceedings, because both are instituted under Section 312 of the Communications Act of 1934, as amended. In this connection, the Commission in Victor Muscat, 22 RR 2d 1001 (1971) held as follows:

Section 1.223(b) intervention is a matter of privilege, not right. Before bestowing that privilege, the Commission must first weigh, among other things, the effect on an expeditious disposition of the proceeding. "The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of proliferation of parties and other participants." The Firestone Tire and Rubber Co.,

FTC Docket No. 8818, page 4 (October 23, 1970). It would seem reasonable, particularly in a prosecutory-type proceeding where the agency has the burden of proof, to require a substantial showing of special circumstances in order to justify intervention by parties who are otherwise strangers to the proceeding. Such showing would require that the intervenors raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the petitioner the status of a party. What constitutes good cause for intervention will vary with the type of case, satisfaction of the above requirements, and other considerations. Herein, WATR has not shown that its participation will elicit any pertinent information not already before the Commission through official notice and the existing parties including the Broadcast Bureau, nor has it shown any other valid justification for intervention. Discretionary intervention will therefore not be authorized. (22 RR 2d at 1003).

7. Garden State has failed to show any special circumstances which would justify intervention here. Clearly, no substantial issue of law or fact that would not otherwise be properly raised or argued has been presented by Garden State. Its only interest appears to be to use this proceeding to assist it in its appeal of prior actions by the Commission. But such a private interest is insufficient to make Garden State a party to this proceeding. In the event Garden State believes that the record developed herein is in some way relevant to its comparative case or its appeals, that record will be available for its use.

8. Garden State further fails to show how its participation will assist the Commission. It does not show any special knowledge of the facts in this case, and its desire to inquire into alleged prior reporting violations of Gabelli does not appear relevant to a resolution of this proceeding. Its claim that it has more incentive to develop a full record than the Bureau is self-serving and unsupported. Clearly, whatever interest Garden State may have as a denied applicant, those interests are adequately protected by its appeal of the denial of its application. The Presiding Judge will simply not permit Garden State to use this proceeding to launch a collateral attack on

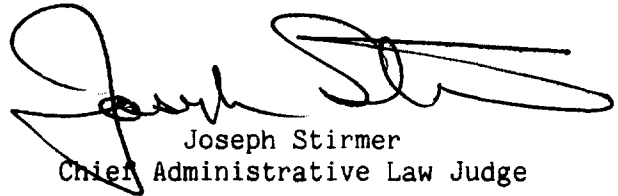
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<sup>1</sup> West Jersey Broadcasting Co., 48 RR 2d 970 (1980), relied on by Garden State, was neither a revocation nor show cause proceeding and is not applicable here. Quality Broadcasting Corp., 4 RR 2d 865 (1965) preceded Victor Muscat which established that "special circumstances" must be shown to justify intervention in a revocation case.

the Commission's prior decisions. Garden State has simply failed to show the special circumstances which would justify its intervention in this proceeding.

ACCORDINGLY, IT IS ORDERED that the "Petition for Leave to Intervene," filed by Garden State Broadcasting Limited Partnership on September 1, 1992, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Joseph Stirmer  
Chief Administrative Law Judge